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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 14

Albert Benjamin Chandler, Individually and as Governor of the Commonwealth of Kentucky, et al., ... Petitioners

vs.

James W. Wise and Ray B. Moss, . . Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PETITIONERS

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IN THE

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No. 14

ALBERT BENJAMIN CHANDLER, Individually and as Governor of the Commonwealth of Kentucky; KEEN JOHNSON, Lieutenant Governor of the Commonwealth of Kentucky, and the President of the Senate of the General Assembly of Kentucky; CHARLES D. ARNETT, Secretary of State of the Commonwealth of Kentucky; JOHN KIRTLEY, Speaker of the House of Representatives of the General Assembly of Kentucky; WILLIAM A. PERRY, Chief Clerk of the Senate of the General Assembly of Kentucky, and BROOKS HARGROVE, Chief Clerk of the House of Representatives of the General Assembly of Kentucky, ... *Petitioners*

vs.

JAMES W. WISE and RAY B. MOSS, ... *Respondents*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PETITIONERS

JURISDICTION

Subsection (b) of Section 344, Title 28, of the Judicial Code, provides in part as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it

for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgement or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, * * * and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

In their petition filed in the Franklin Circuit Court, Frankfort, Kentucky, the respondents herein specially set up and claimed as follows:

"The aforesaid action of the General Assembly of Kentucky in attempting to revoke its previous action in rejecting the proposed Child Labor Amendment and in attempting to ratify said proposed amendment was and is unlawful and violative of the Constitution and laws of the United States * * *.

"The General Assembly of Kentucky having duly rejected said proposed amendment, could not subsequent thereto legally reconsider and adopt said proposed amendment without violating Article 5 of the Constitution of the United States and said action in attempting to reconsider and adopt said proposed amendment violated Article 5 of the Constitution of the United States because said action was not taken within a reasonable time after the amendment was proposed on June 2, 1924, by the Congress of the United States. * * *

"The plaintiffs are without adequate remedy at law in the premises and only by a suit of this nature and by the injunctive process of this court can they be fully protected, as citizens and taxpayers of the Commonwealth of Kentucky and the United States, from the illegal and void action of the General Assembly of Kentucky." (Transcript of Record, pp. 4-5)

In its first decision in this case the Court of Appeals of Kentucky stated:

> "We think the conclusion is inescapable that a State can act but once, either by convention or through its legislature, upon a proposed amendment; and, whether its vote be in the affirmative or be negative, having acted, it has exhausted its power further to consider the question without a resubmission by Congress. If we should be in error in this conclusion—and, of course, our position on this question must bow to the views of the Supreme Court of the United States when they are expressed thereon—there are nevertheless additional questions as to whether or not rejection by more than one-fourth of the States at one time did not terminate the 'offer' of the amendment by Congress, and whether or not, under the decision of the Supreme Court in Dillon v. Gloss, supra, more than a reasonable time had elapsed between the submission of the Amendment and the alleged ratification by Kentucky. Accepting the analogy between the submission of an amendment by congress and the making of an offer, under the principles of the law of contracts, the conclusion that the Amendment was no longer before the States at the time of the proposed ratification by Kentucky in 1937 seems inevitable. * * * (Transcript of Record, pp. 49-50)
>
> "* * * It seems clear that the 'reasonable time' during which the 'offer' remained open necessarily expired at some time during the period of apparent abandonment between the year 1927 and the revival of interest in 1933. Certainly, by any yardstick, more than a reasonable time had elapsed by January, 1937." (Transcript of Record, p. 52)

The decision of the Court of Appeals of Kentucky with respect to the foregoing matters was affirmed by that Court in its second opinion wherein the Court said:

> "No issue or additional question is presented on this appeal, and the court has not changed its view

on any of the questions formerly presented, including those raised under the Federal Constitution." (Transcript of Record, p. 33)

It will be seen from the foregoing quotations from the petition and the opinion of the Court of Appeals of Kentucky that a right under the Constitution of the United States was set up and claimed by the respondents herein, and said matter was adjudicated by a final judgment (Transcript of Record, p. 33). The very essence of this case is a Federal controversy. The matter in controversy is of such great importance to the people of the nation that a final adjudication thereof should be made by this Court. St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S. 265; Swafford v. Templeton, 185 U. S. 487.

The matter in controversy herein is justiciable. Ellingham v. Dye, 99 N. E. 1 (Ind.)

STATEMENT OF CASE

On June 2, 1924, the Congress of the United States proposed the Child Labor Amendment to the states of the Union, and prescribed ratification by the legislatures of the several states as the mode of ratification. On March 24, 1926, the Kentucky Legislature affirmatively rejected the proposed amendment. On December 23, 1936, the Governor of Kentucky issued a proclamation convening the Legislature in Special Session on the same day for the purpose of considering specified subjects which did not include the proposed amendment. The Governor amended his proclamation on January 8, 1937, by adding the ratification of the proposed amendment to the previously specified subjects to be considered by the Legislature. On January 13, 1937, the Legislature adopted a joint resolution purporting to ratify the proposed amendment.

This suit was instituted by the respondents as citizens and taxpayers of Kentucky and the United States by filing a petition in the Franklin Circuit Court, Frankfort, Kentucky, on January 15, 1937, against the petitioners herein to have declared invalid the action of the Legislature on January 13, 1937, purporting to ratify the proposed amendment. The respondents herein sought an injunction against the petitioners to restrain them from sending certified copies of the joint resolution to the Secretary of State of the United States, the presiding officer of the United States Senate, and the Speaker of the House of Representatives of the United States, of any of them, and to enjoin the petitioners from notifying the Secretary of State of the United States of the adoption by the Kentucky Legislature of said resolution. Before a copy of the restraining order was served on the Governor, he mailed attested copies of the resolution to the Secretary of State of the United States. Thereafter the respondents amended their petition by asking for a mandatory injunction against the Governor to compel him to notify forthwith the Secretary of State of the United States that at the time he mailed attested copies of the resolution to the Secretary of State of the United States the validity of the adoption of said resolution had been challenged; and that prior to the receipt of said copies by the Secretary of State of the United States the Governor had been restrained by an order of court from giving notice in any manner to the Secretary of State of the United States of the adoption of said resolution, and that any notice given in violation of said restraining order was null and void. Thereafter the respondents amended their petition, and asked for a mandatory injunction against Albert Benjamin Chandler, individually and as Governor of the Commonwealth of Kentucky, and Charles D. Arnett, individually and as

Secretary of State of the Commonwealth of Kentucky, two of the petitioners herein, requiring them to notify the Secretary of State of the United States that said resolution theretofere certified by them to the Secretary of State of the United States was void and of no effect. The petitioners herein filed a general demurrer to the respondents' petition and the same as amended. The general demurrer was sustained by the Circuit Court. Thereupon the respondents appealed to the Court of Appeals of Kentucky and obtained a reversal of the judgment of the trial court. Upon filing the mandate of the Court of Appeals of Kentucky with the trial court an order was entered pursuant to said mandate overruling the general demurrer of the petitioners. Thereupon the petitioners herein declined to plead further, and judgment was entered adjudging (a) that the respondents herein had the right to maintain this action; (b) that the adoption by the Legislature of Kentucky of said resolution did not operate to ratify said proposed amendment; (c) that notice given by the Governor to the Secretary of State of the United States that the Legislature of Kentucky had ratified said proposed amendment was of no effect; (d) that the Clerk of the Franklin Circuit Court be directed to give official notice to the Department of State of the United States that said resolution was and is invalid; that the proposed amendment has not been ratified by the Legislature of Kentucky according to the provisions of the Constitution of the United States, and the notice given by the Governor to the Secretary of State of the United States notifying him of the adoption of said resolution was and is of no effect. After the entry of said judgment, the petitioners herein appealed therefrom to the Court of Appeals of Kentucky, which Court affirmed the judgment of the Circuit Court. This Court having granted a petition for a writ of certiorari to the Court of Appeals

of Kentucky, the case is now here for review and determination.

ASSIGNMENT OF ERRORS

The assignment of errors herein follows:

The Court of Appeals of Kentucky erred in holding:

(1) That the Kentucky Legislature, in rejecting the proposed Child Labor Amendment, exhausted its power further to consider the proposal.

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*Action on Child Labor Amendment by State Legislatures as Shown by Records of U. S. Department of State

Year	No. of States Voting		No. Included as Ratifying Which Had Previously Rejected	Record at End of Each Year	
	To Reject	To Ratify		States Rejecting	States Ratifying
1924	3	1	....	3	1
1925	19	3	....	22	4
1926	2	....	....	24	4
1927	1	1	....	25	5
1928	....	....	....	25	5
1929	....	....	....	25	5
1930	....	....	....	25	5
1931	....	1	....	25	6
1932	....	....	....	25	6
1933	....	14	5	20	20
1934	....	....	....	20	20
1935	1	4	3	18	24
1936	....	....	....	18	24
1937	....	3	2	16	27

(2) That rejection of the proposed Child Labor Amendment by more than one-fourth of the states operated to defeat and terminate the proposal.

(3) That at the time the Kentucky Legislature attempted to ratify the proposed Child Labor Amendment on January 13, 1937, said proposal was not before the people because of the expiration of a reasonable time for ratification since submission thereof by the Congress.

(4) That the attempted ratification of the proposed Child Labor Amendment by the Kentucky Legislature on January 13, 1937, was invalid.

SUMMARY OF ARGUMENT

1. REJECTION OF THE PROPOSED AMENDMENT BY THE LEGISLATURE DID NOT EXHAUST THE LEGISLATURE'S POWER WITH RESPECT TO THE RATIFICATION OF THE AMENDMENT

The power to reject a proposed amendment is not a delegated power, but is one which inheres in the legislature, is of a continuing nature, and may be exercised at the will of the legislature as often and as many times as the legislature desires before the proposed amendment is finally ratified.

2. REJECTION OF THE PROPOSED AMENDMENT BY MORE THAN ONE-FOURTH OF THE STATES DID NOT DEFEAT THE PROPOSAL.

As rejection of the proposed amendment by the legislature is not binding on the legislature, such rejection by more than one-fourth of the states cannot operate to defeat the proposed amendment.

3. THE PROPOSED AMENDMENT HAD NOT TERMINATED AT TIME OF RATIFICATION BY THE KENTUCKY LEGISLATURE BECAUSE OF THE EXPIRATION OF REASONABLE TIME

The amendment to the Federal Constitution was intended by the framers thereof to be a slow process. The procedure of amendment was designed to require a considerable time for the completion of the amending process. In computing the period of time to terminate the pendency of a proposed amendment, only such time as expired between consecutive actions by two legislatures or since the last action of any legislature should be considered. Three years is the longest period of time that has expired between any two consecutive actions of legislatures with respect to the proposed amendment. Three years cannot be considered as such period of time as will bar the exercise of the legislative power to ratify a proposed amendment.

ARGUMENT

(1) Ratification of the Proposed Amendment Did Not Preclude Further Action of the Legislature

Amendment of the Federal Constitution is governed by Article V thereof, which is as follows:

> "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

A consideration of the history of this Article of the Constitution might be helpful to an understanding of its meaning. Before we had a Federal constitution, we had constitutions of the original Colonies. Six of the first thirteen state constitutions framed provided for their future revision. This feature was without precedent in other countries. It was designed to add stability and continuity to government. By 1787 the number of state constitutions providing for their alteration had increased to eight. Three of the constitutions vested the amending power in the general assemblies. The other five provided that revision could be made by convention of the people.

Article Thirteen of the Articles of Confederation, which became effective March 1, 1781, provided that:

> "the articles of this Confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration, at any time hereafter, be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state."

This strict requirement for the amendment of the Articles contributed largely to the failure of the Confederation.

The Federal Convention met in May, 1787, to revise the Articles of Confederation. At the convention Edmund Randolph presented a set of resolutions outlining a plan of union of the states. Randolph's Thirteenth resolution stated that:

> "provision ought to be made for the amendment of the Articles of the Union whensoever it shall seem necessary, and the assent of the National Legislature ought not to be required thereto."

Objection arose as to the assent of the national legislature not being required for the adoption of an amendment, which resulted in the latter part of the resolution being stricken out. The resolution as thus changed was adopted and referred to the committee of detail. Article XIX of the first draft of the Constitution was as follows:

> "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose."

Article XIX was first adopted in the above form. Upon reconsideration, however, it was decided that the national legislature should be given some power to initiate amendments, because that body would be the first to realize the need for a change. James Madison then proposed the following as a substitute to Article XIX:

> "The Legislature of the U—— S—— whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as parts thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Legislature of the U. S."

John Rutledge of South Carolina proposed that the following clause be added:

> "provided that no amendments which may be made prior to the year 1808. shall in any manner affect the 4 & 5 sections of the VII article."

Rutledge's proposal was accepted.

Article XIX of the first draft of the Constitution was designated Article V of the second draft, and read as follows:

> "The Congress, whenever two-thirds of both houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this constitution, which shall be valid to all intents and purposes, as parts thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the and sections of article. "

Thereafter the Article was amended by adding the clause:

> "that no State, without its consent shall be deprived of its equal suffrage in the Senate."

The adoption of this amendment gave final form to Article V.

An analysis of this Article of the Constitution discloses that the only power granted to a state with respect to acting on a proposed amendment is the power to ratify such amendment. This Court has held that the power of a state to ratify a proposed amendment is derived from the Federal Constitution. Hawke v. Smith, 253 U. S. 221; Leser v. Garnett, 258 U. S. 130.

It is true that a state has the power to fail or refuse to ratify a proposed amendment to the Federal Constitution. Such a power, however, is an inherent rather than a granted power. It is a part of the legislature's natural power and right to refuse to do anything which is not

mandatory. As the power of the legislature to reject a proposed amendment is an innate power, the exercise thereof does not operate to extinguish the power. It is of a continuing nature, terminable only by an exercise of the power to ratify, and until the power to ratify is exercised, the power to reject may be exercised as often and as many times as the legislature may desire.

Superimposed on the legislature's power to reject a proposed amendment is the granted power to ratify such an amendment. An exercise of the power to ratify cuts off and ends the power to reject. When a legislature once ratifies a proposed amendment such action is final. A subsequent attempt to reject the proposal would be ineffectual. The granted power to ratify is expended by its first exercise. The power cannot be recalled, and the act of ratification is irrevocable.

These views conform generally to the best available authorities on the question. Thus Jameson, in the Fourth Edition of his Constitutional Conventions, at page 628, wrote:

> "But, whether this decision is authority upon the question now considered or not, the right of a State legislature, after a negative vote has once been passed, to recede from it and ratify an amendment, is, we think, upon principle, unquestionable. The language of the Constitution is, that amendments proposed by Congress, in the mode prescribed, 'shall be valid to all intents and purposes, as part of this Constitution, *when ratified by the legislatures of three-fourths of the several States*, &c. By this language is conferred upon the States, by the National Constitution, a special power; it is not a power belonging to them originally by virtue of rights reserved or otherwise. When exercised, as contemplated by the Constitution, by ratifying, it ceases to be a power, and any attempt to exercise it again must be a nullity. But, until so exercised, the power undoubtedly, for a reasonable time at least, remains."

Professor W. F. Dodd, writing in 30 Yale Law Journal 321, 346-347, stated:

> "As Jameson says, Congress has definitely taken the view in this instance that a state having once ratified may not withdraw its ratification of a federal amendment. This view seems clearly a correct one. . . .
>
> "On the other hand, it is perhaps clear that a state legislature has a continuing power of ratification until an amendment is adopted, or until such a long period has elapsed that a sort of statute of limitations may be said to have run against any power to ratify the proposal. It may be remembered that the power in the state legislature is one derived from the federal Constitution, and is a power to ratify, not a power to reject. If a constitutional convention is proposed, one state legislative session may not by explicitly rejecting prevent the future exercise of the federal power conferred upon the state legislature. Rejection by a state legislature is in this respect equivalent to the negative result arising from state legislative inaction. There is no power in and of itself to reject a federal constitutional amendment, and failure to ratify by one-fourth of the states is sufficient."

In his treatise on Constitutional Law, at page 204, Judge Cooley wrote:

> "It is interesting, however, to note that, in a somewhat analogous case, it has been repeatedly decided that consent once given is given finally. Where by statute a municipality is permitted, with the consent of a majority of its electors, to raise exceptional taxes or assume exceptional burdens an election once held which results in a favorable vote is conclusive. If, however, the first election results in a majority against the proposal, and there is nothing in the law which negatives the right to vote again, the case stands as if no election had been had, and the

sense of the people may be taken again and again, and a favorable vote at the last election is as effectual as if it had been obtained at first."

To the same effect are the cases of Woods v. Lawrence County, 1 Black (66 U. S.) 386, and Calhoun County v. Galbraith, 98 U. S. 214.

The views expressed herein are also supported by action of the Congress. On July 20, 1868, Secretary of State Seward announced that if the newly constituted bodies representing themselves as being the legislatures of the states of Alabama, Arkansas, Florida, Louisiana, North Carolina and South Carolina, were the proper bodies to ratify a proposed amendment to the Federal Constitution, and if the attempts of the legislatures of Ohio and New Jersey to change their prior ratifications to rejections were not considered, then the Fourteenth Amendment had been adopted. On the next day the Congress passed and transmitted to the Secretary of State a concurrent resolution that the Fourteenth Amendment "is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." Prior to their votes of ratification, the legislatures of Georgia, North Carolina and South Carolina had voted to reject the proposed amendment. Therefore, the resolution of the Congress is a commitment by that body that a state legislature's ratification of a proposed amendment to the Federal Constitution is final, but that a vote of rejection may thereafter be changed to a vote of ratification.

The Court of Appeals of Kentucky was of the view that the proposal by the Congress of an amendment to the Federal Constitution was analogous to the making of an offer for acceptance or rejection under the law of

contracts. The petitioners do not admit the correctness of such a view. If there is any similarity, it is very slight. The matter of an offer for an acceptance or rejection under the law of contracts contemplates two parties of opposing interests. Such a situation does not exist with respect to the proposal of an amendment to our Federal Constitution. The Federal Constitution is a basic agreement among the people of America entered into for the purpose of forming a partnership or union for their common government. The American people constitute but one party to the Constitution.

In adopting the Federal Constitution the people of America designated and authorized the Congress to act as their agent in proposing amendments to the Constitution. The people further authorized the Congress, in proposing amendments, to designate for the people their agents to ratify the amendments. Therefore, in proposing an amendment to the Constitution, the Congress does not act as an independent party, but merely as the agent of the people of the nation. Likewise, the amendment is not proposed to an independent party or parties but merely to other agents of the people. The people have agreed that in the process of ratifying a proposed amendment they are to be divided into groups, with the people in each of the several states comprising one group. The ratifying conventions or legislatures, as the case may be, act as agents of the people in their respective states. The whole amending process is by and for the people of America. Thus we see that the proposal of an amendment to our Federal Constitution differs fundamentally from an offer for acceptance or rejection under the law of contracts.

(2) Rejection of the Proposed Amendment by More Than One-Fourth of the States Did Not Defeat the Proposal

The Court of Appeals of Kentucky concluded that the proposed Child Labor Amendment was not subject to ratification by the Kentucky Legislature because it was no longer pending, by reason of having been rejected by more than one-fourth of the states.

If our previous arguments about a rejection of a proposed amendment not preventing subsequent action thereon are sound, then it follows that the rejection of the proposed Child Labor Amendment by more than one-fourth of the states did not and could not operate to defeat the proposal. The rejections by the states were equivalent to inaction by them. The states were not bound by their rejections.

Rejection of a proposed amendment by more than one-fourth of the states does not *ipso facto* defeat the proposal, but merely indicates that the proposal will not be adopted. If thirty-six or more states were to reject a proposed amendment, such action would doubtless be accepted by the people of the nation as conclusive that the proposal would not be adopted. Subsequent ratification by other states would seem futile and perhaps would not occur. The proposal would later terminate by the elapse of time as hereinafter explained.

(3) The Proposed Amendment Had Not Terminated by the Elapse of a Reasonable Time

The Court of Appeals of Kentucky was further of the opinion that at the time the Kentucky Legislature purported to ratify the proposed Child Labor Amendment the proposal had terminated by reason of the expiration of a reasonable time for ratification since its submission, and was therefore no longer before the

people. In arriving at this conclusion the Kentucky Court was influenced by the opinion of this Court in the case of Dillon v. Gloss, 256 U. S. 368, in which this Court held that the period of seven years prescribed by Congress for the ratification of the Eighteenth Amendment was a reasonable period of time.

In proposing the Child Labor Amendment, the Congress did not specify any time for the completion of the ratification. We believe that there should be some limitation as to the period of time during which a proposed amendment should be considered as pending before the people for ratification. In determining such a period of time consideration should be given to several facts. The framers of the Constitution thought it wise that the amendment of the Constitution should be a slow and difficult process. They therefore provided a procedure for amendment which would require a considerable period of time to complete. If the framers of the Constitution intended that a long period of time should be required for the amendment of the Constitution, the subsequent increase in the number of states and increase in population of the nation would make a much longer period of time reasonable today. Frequent action by the legislatures of the several states with respect to a proposed amendment should be considered as keeping the proposal alive. If only a reasonable time expires between action on the proposal by one legislature and action on the proposal by another legislature, and that process continues until a large number of legislatures—less than thirty-six—have acted, then it seems reasonable that the proposal has not terminated by the elapse of time even though a period of several years has expired between the action of the first state and the action of the last state. If a period of several years expires between the action by one legislature on the proposal and the action by the next legislature on the pro-

posal, then it may be considered that the proposal has terminated by the elapse of time. Also, if a period of several years has expired since the action by the last state, and the number of states having ratified is less than thirty-six, then it may be considered that the proposal has terminated by the elapse of time. Applying these principles to the proposed Child Labor Amendment we find that three years is the longest period of time that expired during which there was no action on the proposal by any legislature. It is submitted that three years is too short a time to constitute such a period of time as would terminate the pendency of the proposed amendment.

CONCLUSION

The questions involved in this case are very serious and very important in their nature. They relate to the fundamental rights of self-government by the people of the nation. They have produced doubt and fear among the people. They should be clarified and answered by the highest court of the land.

Respectfully submitted,

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and
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